

NOT DESIGNATED FOR PUBLICATION  
ARKANSAS COURT OF APPEALS  
JUDGE KAREN R. BAKER

DIVISION I

CACR06-175

OCTOBER 4, 2006

JOE DAVIS, JR.

v. APPELLANT

STATE OF ARKANSAS

APPELLEE

APPEAL FROM THE PULASKI COUNTY  
CIRCUIT COURT  
[CR2004-5038]

HONORABLE JOHN W. LANGSTON,  
JUDGE

AFFIRMED

Appellant Joe Davis, Jr., was tried by a Pulaski County jury and found guilty of the offense of rape. He was sentenced to fifteen years in the Arkansas Department of Correction. While the actual facts related to the offense of rape do not affect the point of appeal in this case, we will briefly state them at the outset. Appellant's daughter, J.D., who was ten at the time of trial, accused her father of engaging in sexual intercourse with her on dates uncertain between June 23, 2002, through August 11, 2004, and appellant denied any sexual encounters with his daughter. He was charged, tried, and convicted. Appellant's point in this appeal challenges the trial court's refusal to instruct the jury with a definition of a sexual assault in the second degree, as defined in Arkansas Code Annotated section 5-14-125(a)(3)(Repl. 2006), arguing that the offense is a lesser-included offense of rape. We affirm the conviction.

The problem with appellant's argument is that he totally denied ever touching his daughter in an inappropriate manner, stating that he did not have sex with her on August 11, 2004, nor any other time before or since. Our supreme court has held that there is no rational basis for a lesser-included offense instruction when the defendant denies entirely any sexual encounter with the purported victim. *See e.g., Fry v. State*, 309 Ark. 316, 829 S.W.2d 415 (1992). Here, appellant denied ever touching his daughter in an inappropriate or sexual way. Appellant's denial of such conduct makes the trial court's refusal of the requested instructions entirely proper. Therefore, it is not necessary for us to address whether the sexual-assault offense is a lesser-included offense of rape because the trial court did not err in refusing to give the requested instructions.

GLADWIN and ROBBINS, JJ., agree.